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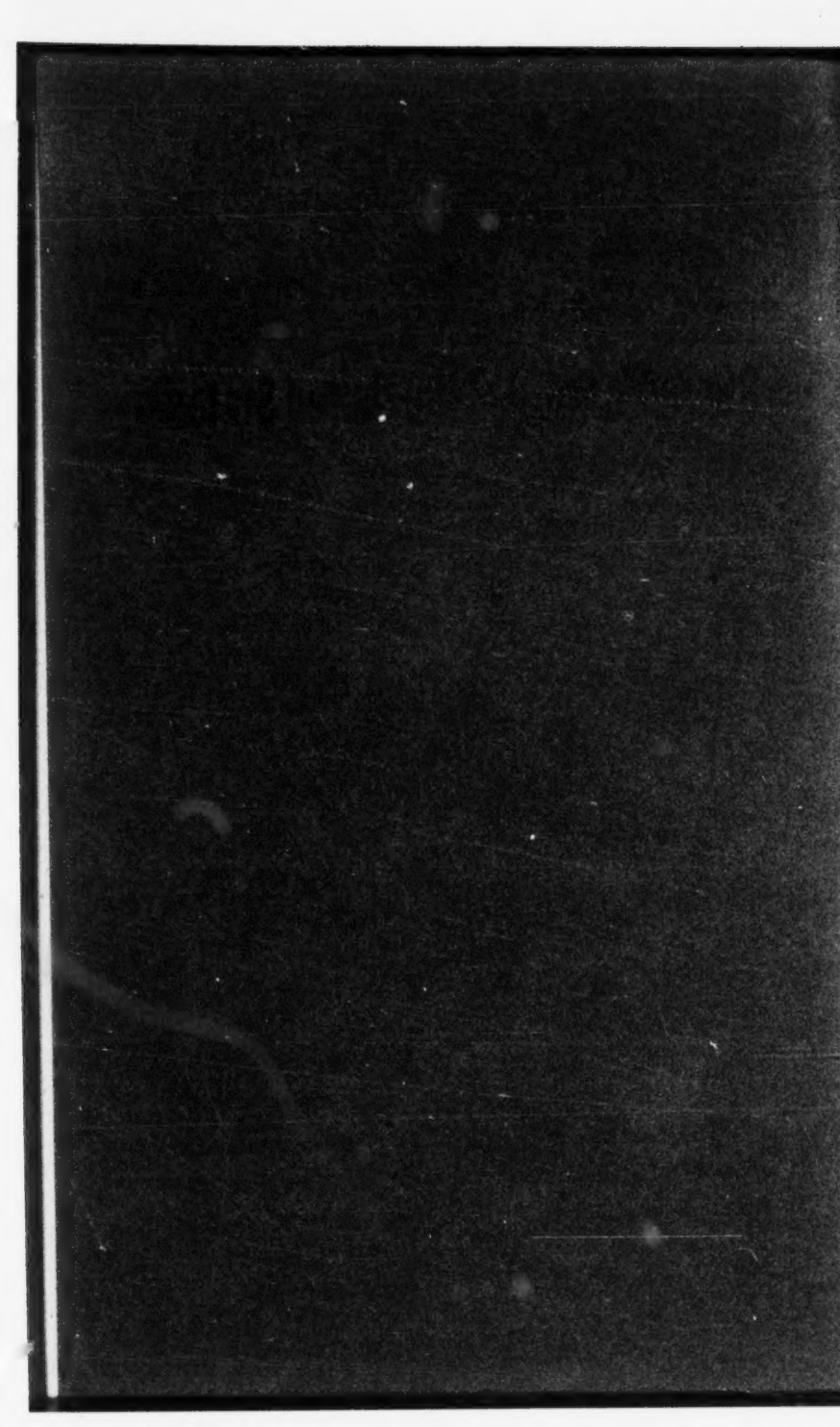

IN THE

Supreme Court of the United States

(OCTOBER TERM, 1923.)

MISSOURI PACIFIC RAILROAD COMPANY, (Appellant Below), PETITIONER,

VS.

R. L. HANNA (Appellee Below), RESPONDENT.

No. 313.

BRIEF FOR RESPONDENT.

STATEMENT.

The statement of facts as quoted from the opinion of the Supreme Court of the State of Arkansas and set out in the brief for petitioner, is correct.

In the petition for writ of *certiorari* to the Supreme Court of Arkansas and the brief in support of petition, counsel for petitioner attempted to quote from the opinion of the Supreme Court of Arkansas and, in doing so, omitted an important part of the opinion. Below is an exact quotation showing the omitted part in italics:

"Appelant's main contention for reversal is that according to the undisputed facts, appellee was injured while attempting to debark from a moving train in violation of his contract for transportation. In support of this contention appellant cites the case of Illinois Central Railroad Co. v. Jennings, 229 Ill., 608, 82 N. E. 403, which decided that such a stipulation was valid. Conceding that the liability is determinable by the law of the State where the injury occurred, and that the Supreme Court of Illinois has upheld the validity of such a clause in a transportation contract as being reasonable and just, the contract and adjudication, upholding its validity, have no bearing upon or application to the instant case. This suit is not for a breach of the contract, *but for an injury resulting from an alleged negligent act of appellant's employee. The action is outside of the contract.* It is based upon the maxim *respondeat superior*, which imputes liability to a master for the negli-

gent acts of his servant, within the scope of the servant's actual or apparent authority, irrespective of any contract. 4 R. C. L., Sec. 596."

Brief of the Argument.

I.

The Interstate Commerce Act of Congress was not brought into question, nor was any federal issue raised in the trial court.

There is nothing in the record to make it appear that such an issue was raised. Petitioner relies solely on the refusal of the trial judge to instruct the jury to find for the defendant to support the claim that a federal issue was raised.

It has been uniformly held by the Supreme Court of Arkansas that questions of whatever nature, not raised and properly preserved for review in the trial court, will not be noticed on appeal.

Brown v. Wilkes, 153 Ark., 545;
Phoenix Cement Sidewalk Co. v. R. W., etc., Co,. 101 Ark., 22;
Jones v. Seymour, 95 Ark., 593;
Price v. Greer, 89 Ark., 300;
Felsberg v. Moore, 84 Ark., 399.

In Jones v. Seymour *et al.*, *supra*, the court says:

> "The object of requiring the parties to present all questions and issues to the lower court before they can be presented to this court is to have the lower court pass thereon so that this court upon appeal may determine whether or not such ruling was erroneous. The purpose is also in furtherance of justice to require the party to first present the question he contends for in the lower court, so that the other party may not be taken by surprise."

This court has repeatedly held that one who desires to save his right of review by the federal Supreme Court must raise the federal question on which he relies in the trial court.

> Willoughby v. Chicago, 235 U. S. 45;
> Zayas v. Lothrop, 231 U. S. 171;
> Rosenthal v. N. Y., 226 U. S., 260;
> Cincinnati, N. O. & T. P. R. Co. v. Slade, 216 U. S., 78.

A federal question was not even raised on appeal to the Supreme Court of Arkansas. At that time appellants urged that the law of Illinois governed, and the opinion of the court shows that the case was submitted and decided on that issue. It

does not appear that the Interstate Commerce Act was mentioned or any federal issue called to the attention of the Supreme Court of Arkansas until appellant presented its petition for re-hearing to that court. But it is too late to raise the question for the first time in a petition for re-hearing after judgment has been rendered by the State Court.

Jett Bros. Dist. Co. v. Carrollton; 252 U. S. 1;
Mergenthaler Linotype Co. v. Davis, 251 U. S. 256;
GodChaux Co. Inc. v. Estopinal, 251 U. S., 179;
Bilby v. Stewart, 246 U. S. 255.

The Arkansas Supreme Court refused to consider the petition for re-hearing and declined to pass on the federal issue which had not been presented in proper time.

Petitioner has no right to ask a review by the Supreme Court of the United States where the state appellate court declines to consider the question.

Anderson v. Durr, 42 S. Ct., 15.
Cox v. Texas, 202 U. S., 446.

Chicago, etc. R. Co. v. McGuire, 196 U. S., 128.

In Anderson v. Durr, *supra*, the court held that where re-hearing is denied without giving any reasons, the contention must be regarded as having come too late to raise a question for review by the Federal Supreme Court.

Where a writ of *certiorari* has been granted and it appears that the question upon which the *certiorari* was prayed was not before the court below, the writ of *certiorari* should be dismissed.

Anderson v. Durr, 42 S. Ct., 15.
Houston Oil Co. v. Goodrich, 245 U. S., 440.
Tyrrell v. Dist. of Columbia, 243 U. S., 1.
Furness v. Yang-Tsze Ins. Assn., 242 U. S., 430.
Hartford L. Ins. Co. v. Johnson, 249 U. S., 490.

We therefore submit that petitioner has no right to ask a review in this case and respectfully urge that the writ of *certiorari* should be dismissed.

II.

If this court should refuse to dismiss the writ of *certiorari* heretofore granted, then we respectfully urge that the Supreme Court of Arkansas did not commit any of the errors assigned by petitioner.

Petitioner claims as a defense that respondent is not entitled to recover because when injured, he was traveling on a free pass issued pursuant to the terms of a live stock contract in which he had released the carrier from all liability for any personal injury which he might sustain, thus bringing his claim within the authority of the following cases:

K. C. S. Ry. Co. v. Van Zant, (Jan. 2, 1923).

Charleston Ry Co. v. Thompson, 234 U. S., 576.

Boering v. Chesapeake B. R. R. Co., 193 U. S., 442.

N. Pac. R. R. Co. v. Adams, 192 U. S., 440.

In the cases cited by petitioner to support its contention, the persons injured were traveling on a free pass and were held to be gratuitous passengers. In each of these cases passes were issued by

reason of the relation of the passenger to the railroad company.

The case at bar comes within the rule laid down by this court in the case of New York C. R. Co. v. Lockwood, 17 Wall., 357, 384, 21 L. Ed., 627. 641, in which case it was decided that a person traveling on a "drover's pass" issued upon a live stock contract precisely similar in its terms to that which we have in this case, was a passenger for hire, and that a release from liability for injuries caused by the carrier's negligence was void because a common carrier could not lawfully stipulate for such exemptions.

This decision was rendered in 1873, and has been frequently approved:

Norfolk Southern R. Co. v. Chatman, 244 U. S., 276.

Geo. N. Pierce Co. v. Wells, F. & Co., 236 U. S., 278.

Santa Fe P. & P. R. Co. v. Grant Bros. Constr. Co., 228 U. S., 177.

Tripp v. Michigan C. R. Co., 238 Fed., 449.

In Norfolk Southern R. Co. v. Chatman, *supra*, the court said that the Lockwood case "must be regarded as establishing a settled rule of policy".

Commenting on the Interstate Commerce Act, this court further said:

> "It results that the 'settled rule of policy' established by the Lockwood case, and the decisions following it, must be considered unmodified by the Act to Regulate Commerce; that the plaintiff in charge of his stock, traveling upon a pass permitted to be issued by that act was a passenger for hire."

It is also contended by petitioner that the Supreme Court of Arkansas refused to consider the provisions in the Drover's Pass which required the respondent to remain in the caboose while the same was in motion, and to get on and off said caboose while the same was still, as a defense to plaintiff's cause of action.

The Supreme Court of Arkansas in passing upon this contention said:

> "Conceding that the liability is determinable by the law of the State where the injury occurred, and that the Supreme Court of Illinois has upheld the validity of such a clause in a transportation contract as being reasonable and just, the contract and adjudication, upholding its validity, have no bearing upon

or application to the instant case. This suit is not for breach of the contract, but for an injury resulting from an alleged negligent act of appellant's employee. The action is outside of the contract. It is based upon the maxim *respondeat superior,* which imputes liability to a master for the negligent acts of his servant, within the scope of the servant's actual or apparent authority, irrespective of any contract."

In this opinion the court was in direct accord with the Lockwood case and the late case of Norfolk Southern R. Co. v. Chatman, cited above, and correctly held that defendant could not escape liability for a negligent act of itself or its employee by pleading a provision of the contract.

It was further contended by petitioner that the conductor in charge of said train upon which the respondent was a passenger, had no authority to waive the conditions in the contract. In support of this contention petitioner relies on the case of Illinois Central Railroad Co. v. Jennings, 229 Ill., 608. In that case the court held that "it rested upon the plaintiff to affirmatively show that it was within an apparent scope of the authority of the conductor to waive the benefit of the con-

tract'' and that proper proof of such authority was not made.

In the present case the court held that the proof on this issue was sufficient and in passing on this question said:

> 'The conductor was in command of the train, and necessarily possessed authority to direct passengers when and where to get off. His own testimony reveals that he had such authority.''

We respectfully submit that no federal question was raised or considered, either in the trial court or in the Supreme Court of Arkansas, and for that reason, the writ of *certiorari* should be dismissed.

We further submit that the decision of the Supreme Court of Arkansas is not in conflict with the decisions of this court, the Circuit Court of Appeals or the Supreme Court of Illinois, and that the judgment of the Supreme Court of Arkansas should be affirmed.

Respectfully submitted,

ARTHUR L. ADAMS,

Counsel for Respondent.